

STATEMENT OF REP. JOHN LARSON OF CONNECTICUT**MARKUP OF H.R. 2844****"CONTINUITY IN REPRESENTATION ACT OF 2003"****WEDNESDAY, NOVEMBER 19, 2003**

Mr. Chairman, I want to begin by complimenting you for holding the continuity of government hearing of September 24, 2003, which ranged over the entire landscape of continuity of government issues. In my relatively short tenure as a member of the House since 1999, this was perhaps the most illuminating presentation and give-and-take between the Members and the witnesses that I have had the occasion to participate in, learn from and enjoy. Chairmen Sensenbrenner and Dreier made a vigorous presentation of their strongly-held views, and it was useful for those of us who may strongly disagree to engage in debate with those who feel passionately about an issue.

I also want to express my thanks to the panel of scholars, officials and group representatives who participated. Norm Ornstein and Tom Mann and the Continuity of Government Commission have led the public discussion of these issues since 9/11. Doug Lewis of the Election Center and Minnesota Secretary of State Mary Kiffmeyer thoughtfully presented to us the difficulties in conducting elections under adverse circumstances, and artificial time frames. Don Wolfensberger of the Woodrow Wilson Center demonstrated how minds can change--in his case, on the subject of congressional disability-- and consider possible compromises after exposure to a vigorous debate.

Reps. Frost and Baird, who oppose the bill before us today and support a constitutional amendment, should be congratulated

for their leadership. Rep. Frost played a critical role in sensitizing Members of Congress to these issues in his work as co-chair on the task force on continuity with Rep. Chris Cox in 2002. Rep. Baird introduced a thoughtful constitutional amendment in the last Congress and is preparing another version.

I emerged from the hearing strongly supportive of a constitutional amendment to allow temporary appointees to serve in the House pending expedited special elections. I am working on a draft of that proposal, and will hold a forum with academic experts in Hartford, Connecticut on December 1 to involve the public directly in the critical debate we must have.

Mr. Chairman, the reason the issue of congressional continuity has not yet reached critical mass is that the Members are reluctant to confront their own mortality, to deal with the unpleasant mechanics and technical details of their own demise or potential incapacity. Unfortunately, our adversaries are thinking about just those things, all the time, and planning the details carefully, as saw on September 11. We must demonstrate similar intensity.

In addition to thwarting terrorists in the short term, we must also ensure that, if an attack actually succeeds in damaging the personnel of our government, that it fails in its ultimate objective to destroy the functioning of government, which is what gives substance to our principles of democracy. September 11 has forced us to confront the fact that gaps and flaws in our constitutional system exist, and that survival of the system is more important than the survival of any individual. Now we must back that up with substantive action.

That is why I am disappointed that the House Administration Committee is rushing H.R. 2844 through today. The substitute amendment that is expected to be proposed in the markup tinkers

around the edges of the flaws in the original bill, but fails to fully address them.

The Majority apparently crafted the substitute based on a line in Mr. Doug Lewis' testimony at our hearing, in which he summarized the views of state elections administrators polled by his organization:

"While the responses indicated a variety of dates ranging from the shortest time...of 35 days (after determination of who the candidates will be) to a period of four months, it appears that elections administrators feel they can conduct an election with as few as 45 days. However, the election officials would be far more confident that the interests of democracy would be best served by having up to 60 days to get the elections organized and held. Each additional day beyond the 45-day minimum time frame creates greater confidence in the process." (Page 3 of testimony of R. Doug Lewis, Executive Director of the Election Center, before the Committee on House Administration)

I would point out that Mr. Lewis has not endorsed the Sensenbrenner substitute before us today.

If the House loses its ability to function due to the absence of a quorum, under certain worst-case scenarios of mass deaths and incapacity which we must nevertheless consider as very real possibilities, the House might remain paralyzed for at least 45 days under the provisions of H.R. 2844. The bill would accept that premise. I cannot.

As Dr. Ornstein has written: "...If there are huge numbers of dead or incapacitated Members of the House, a resort to special elections would leave a gap of two to three months without a

House or with a House wildly unrepresentative politically or geographically of the country. “(*Roll Call*, September 3, 2003)

The American people must be able to count on a functioning Congress in the wake of a catastrophic terrorist attack. Two days after 9/11, Congress passed legislation expediting benefits for public safety officers killed or injured in the line of duty. Three days after 9/11, Congress appropriated \$40 billion in emergency funds and approved legislation supporting the use of military force. A week later, Congress enacted important legislation affecting our economy and securing the air transport system, and compensating the victims of the 9/11 attacks. Had events unfolded differently, none of this legislation might have been enacted in timely fashion. Or the President might have usurped constitutional powers of Congress, hoping for subsequent ratification of his actions.

I believe it is essential to consider a constitutional amendment that is the only way to effectively remedy structural deficiencies in the Founders’ plan for our country, deficiencies which they could not have foreseen.

I also support the idea of a new statute that seeks to expedite the conduct of special elections and replenish the House more quickly in the event of a catastrophe, but it needs to be done in concert with a constitutional amendment and with respect for views of the states.

Such a statute should not place new unfunded mandates upon the states.

It must allow sufficient time for the public to participate in campaigns and to learn the views of the candidates.

It needs to allow independent candidates an opportunity to access the ballot.

It needs to allow time for polling places to be arranged, ballots to be printed and distributed, poll workers to be trained, and for absentee and military voters to learn about the election and to request, receive, and transmit their votes in time to be counted.

The Democratic staff recently spoke with the Director of the Military Voting Rights Project at the National Defense Committee, Mr. Samuel Wright, who testified in Senate Judiciary Committee hearings on continuity in September 9. He wrote: "In the sort of short-notice special election that you envision here, military absentee voting (or any absentee voting) would be completely out of the question."

Special elections currently come in all shapes and sizes under different state laws, with widely varying deadlines to meet, some with and some without requirements for party primaries, and some without the need for candidates to even identify with parties; some also require runoffs.

We have three members of this committee who were chosen in special elections. The seat won by Mr. Ehlers of Michigan became vacant on July 31, 1993, he won a Republican primary on November 2, and a special election on December 7. That was 129 days between the time of the vacancy and the time of the election, and it included a primary election.

The seat won by Ms. Millender-McDonald of California became vacant on December 15, 1995; she won an unusual primary election on March 26, 1996, which also doubled as the final special election since all of the candidates she defeated were also Democrats, which negated the state's normal requirement to have all of the top finishers from different parties compete in a runoff. That vacancy lasted 101 days.

The seat won by Mr. Brady of Pennsylvania became vacant on November 11, 1997. He was nominated by a Democratic party committee and then won a special election on May 19, 1998, timed to coincide with the state's primary for the regular two-year term. Thus the total was about 189 days, and that was without a primary.

So the special election with the lowest degree of complexity resulted in the longest period of vacancy, because the state decided to allow a longer campaign and to consolidate the election with others to save time and money. All of these elections took place in safe one-party districts, and all of them took far longer than the time-frame envisioned by H.R. 2844.

I mention this to point out that one size does not fit all, as this bill would seek to require. There is nothing inherently wrong with not having primaries in special elections. Under current laws in state which omit them in special elections, such as Pennsylvania, New York, and, as we shall shortly see when our colleague Rep. Fletcher resigns, in Kentucky, the public can still reject unsatisfactory party nominees in favor of third party or independent candidates, or write-in candidates. But H.R. 2844, which appears to ban primaries, might not allow that because there might not be time for other candidates to qualify for the ballot.

In the majority of states which have special election primaries, the abolition of primaries and the enhanced status of party committees or party conventions or vacancy committees would result in elections which might be seen in those states as undemocratic. Winners of such special elections would serve for the remainder of the term of office, perhaps as long as two years. Under possible constitutional amendments, appointed temporary Members might serve, at most, for only a few months.

An overriding problem in crafting legislation is that the House Administration Committee has jurisdiction over laws

relating to Federal elections, while the House Judiciary Committee has jurisdiction over constitutional amendments. That committee has held a hearing, yet refuses to go further. But its hesitation does not excuse action in haste by our committee.

The joint congressional leadership has responded to the complex thicket of issues and jurisdictional problems by proposing a joint committee to conduct a study and make recommendations late next year. The joint committee could not report legislation. The House has passed a concurrent resolution to create this entity, but it is unlikely that the Senate will agree, so the issues remain squarely before the standing committees of the House.

I believe that only public alarm and public pressure will generate sufficient impetus to push members of the House and Senate to deal seriously on this matter. I applaud the continuing work of the Continuity of Government Commission of the Brookings Institution and the American Enterprise Institute to focus public and media attention on the subject. Sen. John Cornyn, who has led the Senate Judiciary Committee in a series of thoughtful hearings, recently introduced a constitutional amendment (S. J. Res. 23) to facilitate reconstituting the Congress along with detailed implementing legislation that could be considered following ratification of an amendment itself by the states.

My proposal for a constitutional amendment, in its present form and subject to further change, would allow temporary appointees chosen by the state legislatures, or, in their inability to act, by state governors, to serve in the House pending special elections to replenish the elected membership of the House. This would be similar to the way the members of the First and Second Continental Congresses were chosen.

The constitutional amendment would apply only in the most extreme circumstances--when vacancies exist in the majority of seats in the House. I am considering adding to my proposal provisions regarding disability of Members of the House, a matter which can probably be addressed only through a constitutional amendment and which has long been considered the most intractable out of the range of continuity issues.

Under some circumstances, following a catastrophe, the House might be able to continue to function as long as a majority of the Members "chosen, living and sworn" --the definition of a quorum accepted as the appropriate constitutional standard by both houses of Congress for nearly a century--could appear in the chamber, or wherever the House might be meeting, no matter how few in number they might be.

However, while such a House might technically be able to act, it would lack legitimacy in the eyes of the American people and might be unbalanced in terms of political party, geographic representation and range of ideological views, compared to a fully populated House.

And in the event a majority of those "chosen, living and sworn" consisted of incapacitated Members who could not come to the Floor, or function at all if they were brought there, the House might be paralyzed completely. Of course, our goal would be to have the people fill all of the vacant seats by election, as they always have. However, that takes time--too much time under any reasonable scenario to serve as the only solution. In the interim, temporary appointees, authorized by a constitutional amendment, should serve.

I understand the objections of some of my colleagues, including the chairmen of the Judiciary and Rules Committees who testified before us, that the use of temporary appointed Members

would alter the structure of the body as a popularly elected entity since 1789. But we must live in the real world, not trapped in a "Matrix" where everything seems fine on the surface as long as people remain in denial about underlying truths.

Let me quote from our former colleague, the Republican Senator from Wyoming, Alan Simpson, a co-chair of the Continuity Commission. At its most recent public hearing, he urged support for a constitutional amendment and addressed the core issues head-on:

"...The troublesome part is this continual mantra which is we don't want to alter the character of the House. ...It comes from the pride—I'm going to call it that—of saying we have always been directly elected by "the people"....that phrase comes from those who oppose what we do. They say we can't have anything like that because it would alter the character of the House, the people's House, direct election, how troubling, how un-American, how undemocratic.....I want to ask them (a) question: what more could alter the character of your body than bodies?"

I agree with Senator Simpson that a functioning House, even in a temporarily modified form, is far better than no House at all. No House means no Congress, no legislation, and, in the end, no voice for the people, no more democracy.

Mr. Chairman, these issues have proven to be so intractable, due to differing views of Members and the fact that the jurisdiction over continuity issues is divided between our committee and Judiciary Committee in the House, that I am afraid we are moving along several different paths, but never coming together, or working together, like ships passing in the night.

But there may be a way to establish a greater unity of purpose. I heard the Speaker last Wednesday address the Centenary Conference on the Speakership in the Cannon Caucus

Room and emphasize the vital institutional decision-making and unifying role his office can play. He is a former teacher, a student of history. He is also the leader of the House.

I intend to write to the Speaker to urge him to cut through the jurisdictional divide and create opportunities for the House to act on both constitutional amendments, and statutes, in tandem, so that the House can address the entire range of continuity issues using the most appropriate legislative vehicles which the expertise of committees and Members can be harnessed to craft.

I will urge him to make this a priority issue for the House. This is non-partisan. This is critical. The Speaker can present a game plan to produce real solutions that will enhance our nation's constitutional structure and ensure the functioning of our democratic system under even the most adverse conditions. This should be a priority for all Members. I promise him my full support in that effort.